United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2605

75-7088

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD RHOADS, MARILYN RACER and SUSAN HESSE,

Plaintiffs-Appellees,

-against-

J. BENJAMIN McFERRAN, individually and as Director of Personnel for the New York State Department of Social Services, and SIDNEY HOUBEN, individually and as head of the Bureau of Disability Determinations, New York State Department of Social Services,

Defendants-Appellants

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P/S

BRIEF FOR PLAINTIFFS-APPELLEES

EVE CARY
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
Attorney for Plaintiffs-Appellees

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD RHOADS, MARILYN RACER and SUSAN HESSE, Plaintiffs-Appellees -against- J. BENJAMIN McFERRAN, individually and as Director of Personnel for the New York State Department of Social Services; and SIDNEY HOUBEN, individually and as head of the Bureau of Disability Determinations, New York State Department of Social Services, Defendants-Appellants	:	74-2065 75-7088

BRIEF FOR PLAINTIFFS-APPELLEES

QUESTIONS PRESENTED

1. Do public employees have the right under the First Amendment to the United States Constitution to distrubute union and job-related literature to their colleagues inside their offices before and after working hours?

2. Were any of the disputed facts in this action so material as to make the granting of plaintiffs' motion for summary judgment erroneous?

3. Are plaintiffs barred from proceeding in federal court because they defended themselves on constitutional grounds at administrative disciplinary proceedings?

4. Did plaintiffs file an appeal to binding arbitration and if so, are they therefore barred from proceeding in federal court?

5. Were the regulations issued by defendants subsequent to the District Court's order in contempt of that order?

STATEMENT OF THE CASE

This is a consolidated appeal from an order of the District Court for the Southern District of New York, Motley, J., entered on November 18, 1974 granting plaintiffs' motion for a preliminary injunction and summary judgment, and denying defendants' motion for summary judgment; and from findings of fact and conclusions of law and an order entered on January 30, 1975 holding defendant Houben in contempt of Court and giving him three days in which to purge himself of the contempt. The case involves rights under the First Amendment.

Plaintiffs in this action are employees of the Bureau

of Disability Determinations of the New York State Department of Social Services (Bureau). They are members of the Civil Service Employees Association (CSEA), which is the certified collective bargaining agent for employees of the Department of Social Services, and they also participate in the Caucus for an Active Union (Caucus), a dissident group within CSEA. As part of their Caucus activities, plaintiffs frequently wish to distribute leaflets and other written communications to their fellow employees concerning union and job-related matters. Early in 1973, however, plaintiffs were informed by the head of the Bureau, defendant Sidney Houben, that under unwritten office policy, no literature might be distributed in the office without prior approval.

In May of 1973, plaintiffs sought approval as required to distribute a leaflet announcing a meeting to discuss a recent union election (Exhibit A to Complaint). No response to the request was ever received by plaintiffs and the meeting passed without the announcement having been distributed.

On July 12, 1974, another leaflet (Exhibit B to Complaint) signed by the Caucus was placed on the desks of employees in the Bureau of Disability Determinations before they arrived at work. Known members of the Caucus,

including plaintiffs, were summoned to a meeting with agents of defendant Houben and informed that they must obtain permission to distribute literature in the office.

On October 11, 1973, before working hours, a third leaflet was placed on the desks of employees of the Bureau of Disability Determinations urging them to vote for plaintiff Richard Rhoads for CSEA delegate (Exhibit C to Complaint). No one had sought permission to pass out the leaflet and plaintiffs were charged with having done so. Plaintiff Rhoads was subsequently informed by letter that he would be suspended from work for ten days, and plaintiffs Hesse and Racer that they would be suspended for five days each. (Exhibits D, E and F to Complaint).

Plaintiffs filed a grievance pursuant to union contract and a hearing was held on January 10, 1974 which resulted in a finding that all three plaintiffs had been "willfully insubordinate by ignoring the stated office policy and clear instructions regarding such policy" in distributing literature in the office, outside of working hours, without permission. Plaintiffs' suspensions were reduced to $100 fines and reprimands, however, "because of the confusion and lack of clear response relating to the [original request to distribute litera-

ture] submitted by Mr. Rhoads" (Exhibit G to Complaint).

Plaintiffs were informed of their right to appeal to arbitration, but (contrary to the statement of defendants' attorney in his brief; see Exhibits attached to plaintiffs' motion for summary judgment) they decided instead to challenge in Federal Court the rule requiring them to obtain their supervisor's approval before distributing union and job-related literature in the office. The action was filed in District Court on January 30, 1974. Both plaintiffs and defendants moved for summary judgment and subsequently plaintiffs moved for a preliminary injunction.

Oral argument was heard in October, 1974 at which time the motion for preliminary injunction was consolidated with the motions for summary judgment. In November,1974 Judge Motley issued her opinion and order granting plaintiffs' motions and defendants filed a notice of appeal.

In January, 1975 defendant Houben issued a series of guidelines regarding distribution of literature in the office of the Bureau of Disability Determinations requiring employees who wished to distribute literature to notify the Director's office in writing twenty-four hours in advance of distribution and to provide him with

a copy of the literature to be distributed; permitting distribution of leaflets to take place only between 8:00 and 8:30 a.m.; and permitting literature to be distributed only from a table set up near points of access to work areas by no more than two persons.

On the basis of these guidelines, plaintiffs brought on an order to show cause why defendants should not be held in contempt of the District Court's order permitting distribution of literature in the Bureau of Disability Determinations. A hearing was held on January 29, 1975 at which time plaintiff Rhoads testified concerning the manner in which these guidelines effectively prevented employees from reaching their colleagues with their literature.

As to the guideline requiring employees to provide a copy of their literature and twenty-four hour advance written notice of their intent to distribute literature, Mr. Rhoads explained that frequently in emergencies his group does not have their literature prepared twenty-four hours in advance of the time they wish to distribute it (14-15).* He also stated that often they simply do not want management to have copies of union literature

*Numbers in brackets refer to pages in the transcript of the contempt hearing held January 29, 1975.

before employees receive it (15).

As to the requirements that literature be distributed from tables set up in the hall between 8:00 and 8:30 only, Mr. Rhoads testified that there is no place a table could be set up where all arriving employees would pass it (19). Even if there were an acceptable location, however, Mr. Rhoads testified that the 8:00 - 8:30 time limitation would effectively prevent distribution, for the majority of employees arrive at work en masse between 8:25 and 8:35. The requirement that the table must close down at 8:30 would mean that approximately half of the Bureau's employees would not receive the literature (16).

Defendant McKenna testified that the purpose of the advance-notice requirement was to insure that different groups of employees didn't distribute the same literature (32) and that a hundred employees didn't all distribute documents on the same day (33), and so that officials would know in advance whether the literature was, in fact, job-related (33-34). He admitted, however, that, because his office is in Albany, he did not know whether anyone had distributed literature since the Court's order (34-35) and that, although in his own office he had in the past seen children selling candy and strangers distributing political literature, to his knowledge this had not happened in the World Trade Center (36-37).

On cross-examination, Mr. Mckenna admitted that he knew of no instance of disruption caused by employee distribution of literature (45-47). Mr. McKenna testified that some employees remain on office premises for varying lengths of time after working hours, at which time office doors are locked from the inside so that people can exit, but not enter (42-43).

Defendant Sidney Houben testified that one purpose of the guidelines was to prevent strangers from entering the office to distribute literature (57), although he admitted that during working hours a receptionist would keep such persons out and that after working hours doors are locked (58-59). Mr. Houben could not remember any specific instance of a stranger having entered the office (60-61). Second he said he wished to prevent employees from examining confidential files on other employees' desks as they distributed leaflets, although he admitted that employees may remain in the office after working hours without permission as long as they were not leafletting (83).

Both defendants testified that in their opinion, a location could be found for a table which all employees would pass on entering the office (38; 64-67). Neither expressed an opinion on the fact that the table would be required to close down before half of the Bureau's employees arrive for work.

ARGUMENT

POINT I
PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS MAY NOT BE LIMITED AS A CONDITION OF EMPLOYMENT

It is now well-settled law that, although a person does not have a right to public employment, he may not be required to forego his constitutional rights as a condition of such employment, absent a compelling state interest. This rule has been restated most recently by the Supreme Court in the case of Perry v. Sindermann, 408 U.S. 593, 597 (1972):

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

The leading case before Perry v. Sindermann, supra, was Pickering v. Board of Education, 391 U.S. 563 (1968). The doctrine first enunciated in that case, limiting the

power of state officials to dismiss or otherwise penalize an employee for reasons which interfere with First Amendment rights, has been applied to all public occupations. Muller v. Conlisk, 429 F. 2d 901 (7th Cir. 1970) (policeman); Zekas v. Baldwin, 310 F. Supp. 575 (E.D. Wis. 1970) (welfare caseworker): Kiiskila v. Nichols, 433 F. 2d 745 (7th Cir. 1970) (civilian employee of Army distributing anti-war leaflets).

The cases cited by defendants for the proposition that public employees' First Amendment rights may be limited (Civil Service Commission v. Nat. Assoc. of Letter Carriers, 413 U.S. 548 (1973); Fishkin v. U.S. Civil Service Commission, 309 F. Supp. 40 (N.D. Cal. 1969) app. dism. 396 U.S. 278; and Broadrick v. Oklahoma, 413 U.S. 601 (1973)) are not to the contrary, for they simply apply the same balancing test of state and individual interests applied in all First Amendment cases. The cited cases simply conclude that the state has a substantial interest in preventing the civil service system from becoming a political machine, which interest over-rides the interest of public employees in engaging in partisan politics. Thus the courts upheld the constitutionality of the Hatch Act and similar state laws. In plaintiffs' case, no such overriding state interest exists in preventing the

distribution of literature in the office and thus their First Amendment rights may not be limited as a condition of their employment.

POINT II

PEACEFUL LEAFLETTING IS A HIGHLY PROTECTED FORM OF COMMUNICATION WHICH MAY NOT BE ABRIDGED IN ANY PUBLICLY OWNED PLACE ABSENT A SHOWING OF A COMPELLING STATE INTEREST

Peaceful leafletting has long been recognized as a form of communication that is highly protected by the First Amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

Therefore, although when necessary the state may promulgate reasonable regulations governing the time, place and manner in which it is carried out, leafletting may not be unduly restricted in any place owned and operated by the state without a showing that it causes the material and substantial disruption of a function in which the state has a compelling interest. Cox v. Louisiana, 379 U.S. 536 (1965); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

Courts, using this standard, have consistently upheld the right of persons to engage in the non-disruptive

distribution of leaflets in places ranging from the public streets to public schools. Thornhill v. Alabama, 310 U.S. 88 (1940) (public streets); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968) cert. denied 393 U.S. 940 (bus terminals); Unemployed Workers Union v. Hackett, 332 F. Supp. 1372 (D.R.I. 1971) (unemployment offices); Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2nd Cir. 1974), Cert. denied __U.S.__, 42 L.Ed.2d 64 (1974) (welfare centers): Friedman v. Union Free School District, 314 F. Supp. 223 (E.D.N.Y. 1970), Riseman v. School Committee of Quincy, 439 F. 2d 148 (1st Cir. 1971), Downs v. Conway School District, 328 F. Supp. 338 (E.D. Ari. 1971) (public schools).*

In reaching these decisions, courts have examined several different factors, including the nature of the place in which free speech activities are to be conducted (e.g. crowded thoroughfare or quiet sanctuary) the nature of the activity, (e.g. picketing or leafletting), the relationship between the content of the communication to the purpose of the place (e.g. anti-war leaflets in a shopping center or welfare rights information in a welfare center, and the availability of suitable alter-

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* Many other courts have upheld the right of many other employees to distribute literature on company property, but these cases, which are discussed at pp.20-21 infra, were decided under the National Labor Relations Act. Teachers' cases are mentioned here because they were brought under the First Amendment. The decisions in both sets of cases however, were made under identical standards.

native sites for the activity. In examining these factors, courts have created a series of balancing tests designed to measure the degree of disruption of a legitimate state function likely to be caused by a given activity, and the degree to which such disruption must be tolerated so as not to infringe on First Amendment rights. Courts have agreed that the more public the place, the more disruption must be tolerated. Further, the more direct the relationship between the content of the communication and the place in which it is expressed, the more highly protected it is. As this court said in Wolin v. Port of New York Authority, 392 F. 2d 83, 90 (2nd Cir. 1968):

> The propriety of a place for use as a public forum does turn on the relevance of the premises to the protest, but this relation may be found in two ways. In some situations the place represents the object of protest, the seat of authority against which the protest is directed. In other situations, the place is where the relevant audience may be found.

In the case at bar, where employees seek to distribute union and job-related literature to their colleagues in their own office, both of these factors are present. The office is both the place where the relevant audience may be found and the object of the protest.

Defendants argue that because the Bureau of Disability Determinations is not open to the general public,

employees, to whom it is open, forfeit their First Amendment rights on entering. This is clearly not the law. In Albany Welfare Rights Organization v. Wyman, supra at 1323, this Court recognized that "[a] welfare office is not to be equated with a public street" for purposes of determining what free speech activity might be carried out there, but it held that a welfare waiting room is still a "public place" because all may enter who have business to transact with the welfare department. Similarly, in plaintiffs' case, while the Bureau of Disability Determinations does not have to allow persons who have no relation to it to enter and distribute leaflets, employees have a right to enter and remain in their office, and to them it is a public place in which they may exercise their First Amendment rights. This interpretation has been confirmed by the decisions in James v. Board of Education of Central Dist. No. 1 of Towns of Addison et al., 461 F. 2d 566 (2nd Cir.1972) and Russo v. Central School Dist. No. 1 Towns of Rush et al., 469 F. 2d 623 (2nd Cir 1972), when this court, quoting the language of the Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), said that teachers do not leave their First Amendment rights at the schoolhouse gate. There was no suggestion

in those cases that members of the general public could walk into any school and engage in First Amendment activities. This court did hold however, that teachers and pupils -- just like plaintiffs herein -- who had legitimate business on the property could engage in such activities as long as they were peaceful and non-disruptive.

Lloyd Corporation v. Tanner, 407 U.S. 551 (1972) and Central Hardware Co. v. N.L.R.B., 407 U.S. 539 (1972), cited by defendants are inapposite as they involved privately owned property. Although it is true that the state, too, has an interest in seeing that its property is preserved "for the use to which it is lawfully dedicated" Adderley v. Florida, 385 U.S. 39, 47 - 48 (1966) where First Amendment rights are at stake the state must use the least drastic alternative to effect this interest. Shelton v. Tucker, 364 U.S. 479 (1960). Here defendants have not used such a least drastic alternative. Their regulations are not designed to facilitate the operation of the Bureau of Disability Determinations while having the least restrictive impact possible on employees' First Amendment rights.

POINT III
DEFENDANTS CAN SHOW NO SUBSTANTIAL INTEREST IN PROHIBITING THE DISTRIBUTION OF UNION LITERATURE BY EMPLOYEES INSIDE THE BUREAU OF DISABILITY DETERMINATIONS

Once it has been shown that a First Amendment right

exists and is being abridged, the burden is on the state to justify such abridgement with a showing that the exercise of free speech activities will interfere with a substantial state interest. Cox v. Louisiana, supra, Tinker v. Des Moines Independent Community School District, supra. Defendants in the within case have produced no concrete evidence justifying their regulation. Rather, they have expressed but "mere, undifferentiated fear [and] apprehension" (Tinker v. Des Moines Independent Community School District, Supra) first, that leafletting employees will invade confidential files, and second, that allowing employees to distribute leaflets would cause an influx of strangers to leaflet as well.

These fears are totally unsupported by any evidence whatsoever. In the first place, it is clear that no rule governing employees' conduct could have any effect on the actions of non-employees. Secondly, if a non-employee enters the office to distribute commercial literature, he or she can simply be asked to leave. Just as the police in the street are capable of determining which leafletters are political and therefore protected by the First Amendment and which are commercial and required to obtain a leafletting permit, so can Bureau officials determine who are their own employees and who are not. Particularly in light of defendants' own testimony as

to the infrequency of outside leafletters invading the office, the drastic remedy of forbidding First Amendment activity by employees could not be justified, even if it had the effect of keeping out strangers.

As for protection of confidential files, the record is quite clear that employees are permitted to be present in the office before and after regular working hours without permission and there is no more likelihood that a leafletter will invade confidential files than will an employee doing overtime or waiting for a date. (see affidavit of Richard Rhoads accompanying plaintiffs' motion for a preliminary injunction.*)

Furthermore, as Judge Motley found was conceded by defendants at oral argument on the motions for summary judgment (slip opinion p.6) and as plaintiff Rhoads' uncontradicted testimony at the contempt hearing showed

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* Defendants' statements as to whether the Bureau of Disability Determinations is in fact open to employees before and after working hours are contradictory. In their brief and their attorney's affidavit attached to his motion for summary judgment, they argue that employees are not authorized to be in the office outside of regular working hours. At the contempt hearing, however, Defendant McKenna testified that the office opens at 8:00, although work does not begin until 8:30, and that employees are often in the office until 9:00 p.m., four hours after the regular working day ends (29).

This issue need not concern this court, however, for plaintiffs do not demand that the office be opened especially for them. Rather, they wish only to be permitted to distribute their literature during the hours that employees are permitted to be inside the office, whatever those hours may be.

(17-20) plaintiffs are Bureau employees who work on those files and who have access to them all day long. Further, plaintiffs were never accused of having invaded files.

Defendants appear to argue in their brief that the interest of employees' privacy is also at stake.

The law is well-established, however, that a person's right to privacy is greatly diminished when he ventures out of his own house and into a public or quasi-public arena. In the words of this Court in Public Utilities Comm. v. Pollack, 343 U.S. 451, 469 (1951) (holding that non-commercial broadcasting on public buses did not invade passengers' constitutional rights):

> "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

Organization for a Better Austin v. Keefe, supra, further supports the proposition that when the right to distribute leaflets comes into conflict with a right of privacy, a blanket prohibition against leafletting is not justified.

The recent decision of the Supreme Court in Lehman v. City of Shaker Heights, 418 U.S. 298, (1974) 41 L. Ed. 2d 771 by defendants in support of their privacy argument is not to the contrary. There, in a closely divided decision, in which there was no majority opinion, four justices

recognized that many factors go into the decision whether a particular forum is an appropriate one for free speech activities. In particular, the Court considered the nature of the forum. It distinguished the public buses, on which plaintiffs sought to affix placards, from other areas more traditionally associated with the exercise of First Amendment rights on the grounds that on the buses there were "no open spaces, no meeting hall, park, street corner or other public thoroughfare" 41 L. Ed. 2d at 777. The offices of the Bureau of Disability Determinations, however, are far more similar to a public meeting hall for its employees than is a bus, and thus it falls into the category of those public places in which at least certain types of free speech activities must be permitted.

The Lehman case can be distinguished from the case at bar still further. First in Lehman, the communications which were sought to be placed in public vehicles were not specifically related to either the place or the audience, and because the means of communication were signs affixed to the walls of the bus, which were impossible to "turn off", whereas here they are leaflets which can easily be ignored.

This court specifically stated that its holding in Albany Welfare Rights Organization, supra, at 1324 would not permit a welfare recipient to be "badgered

to the point of being made a captive." No allegations have been made in this case that such badgering has ever taken place. Employees who find leaflets on their desks can easily toss them out. Absent coercion it is clear that expression may not be stifled because it may be offensive to the audience. Terminiello v. City of Chicago, 337 U.S. 1 (1948); Cox v. Louisiana, supra; Coates v. City of Cincinnati, 402 U.S. 611 (1971).

Defendants have produced no evidence of any disruption of a legitimate state interest that would justify the severe limitation on First Amendment rights caused by their regulations. In light of the well-established law under the National Labor Relations Act (N.L.R.A.) upholding the right of employees to distribute union and job-related literature outside of working hours on company property, it is clear that defendants' position is indefensible. Although the N.L.R.A. cases are not directly dispositive of a case brought under the First Amendment, they do have direct bearing on the issue of whether a state employer can show the compelling interest necessary to justify limiting First Amendment rights when those same rights are possessed and routinely exercised by every worker covered by the N.L.R.A.

In the most recent of the cases decided under the N.L.R.A., NLRB v. Magnavox Co., ___U.S.___, 39 L. Ed

2d 358 (1974), the Supreme Court held that the right to distribute union-related literature on company property is so valuable that it cannot be waived by union contract. The court stated that a ban on the distribution of union literature by employees at a plant during non-working time constitutes an interference with the recognized right of employees under §7 of the National Labor Relations Act (29 U.S.C. §157) "to form, join or assist labor organizations" or "to refrain" from such activities unless unusual circumstances can be shown to justify it. The court said:

> "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees and so long as the in-plant solicitation is on non-working time, banning of that solicitation might seriously dilute §7 rights. For Congress declared in §1 of the Act that it was the policy of the United States to protect freedom of association, self-organization and designation of representatives of their own choosing."
> 39 L Ed. 2d at 362.

Since employees also have this right under the First Amendment, such a ban constitutes an infringement on free association when imposed by a public employer.

NLRB v. Magnavox is simply the latest in a long and unbroken line of similar holdings. See Republic Aviation Corp. v. Labor Bd., 324 U.S. 793 (1945); Fasco Industries v. NLRB, 412 F. 2d 589 (4th Cir. 1969); NLRB v.

Orleans Mfg. Co., 412 F. 2d 94 (2d Cir. 1969); NLRB v. Midstates Metal Products, Inc. 403 F. 2d 702 (5th Cir. 1968); Republic Aluminum Co. v. NLRB, 394 F. 2d 405 (5th Cir. 1968); P.R. Mallory and Co. v. NLRB 389 F. 2d 704 (7th Cir. 1967); Campbell Soup Co. v. NLRB, 380 F. 2d 373 (5th Cir. 1967); Jas. E. Matthews and Co. v. NLRB, 354 F. 2d 432 (8th Cir. 1965). In fact, there is virtually not a single case in which off-working-hours distribution of union-related literature on company property has ever been upheld without a showing by the employer of special circumstances that would justify the regulation, and the standards used in deciding all of these cases have been identical to the standards used in cases brought under the First Amendment.

The fact that the regulation at issue is not a total prohibition against distribution but only a requirement for prior approval does not remedy the First Amendment violation. The Supreme Court has long held that the state not only may not prohibit, but also may not place burdens on the exercise of a right guaranteed by the Federal Constitution, Saia v. New York, 334 U.S. 558 (1948); Staub v. City of Baxley, 355 U.S. 313 (1957).

This issue has also been addressed in cases brought under the N.L.R.A. In NLRB v. Orleans Mfg. Co., 412

F. 2d 94, 96 (2nd Cir. 1969) the court said:

> "Nor do we believe that this over-breadth is cured by the provision that distribution may be permitted upon company authorization. Since the employees have a statutory right to distribute union literature in non-work areas on their free time, the company may not require them to obtain its permission to exercise that right."

See also; Republic Aluminum Co., v. NLRB, 394 F. 2d 405, 407 n.1 (5th Cir. 1968); NLRB v. United Aircraft, 324 F. 2d 128 (2nd Cir. 1963) Cert. den. 376 U.S. 951 (1964).

Defendants argue that plaintiffs have many alternate sites in which they can distribute literature. While plaintiffs contend that there is no other place where they can effectively communicate with their co-workers, this issue is not one that need concern this court as the law is well settled, again under both the First Amendment and the N.L.R.A., that the right to leaflet on public (or company) property is so important that alternative sites need be considered only when the state (or the employer) can show a substantial justification for limiting communication on the most effective site. Wolin v. Port of New York Authority, supra; NLRB v. Magnavox, Inc, supra; Republic Aluminum Company v. NLRB, 394 F. 2d 405 (5th Cir. 1968); NLRB v. United Aircraft Corp., 324 F. 2d 128 (2nd Cir. 1963).

Defendants have shown no need, compelling or other-

wise, for their rule prohibiting the distribution of leaflets by employees on Department of Social Services' property. It therefore must be struck down as a violation of the First Amendment.

POINT IV.
PURSUIT OF ADMINISTRATIVE REMEDIES DOES NOT BAR A PROCEEDING IN FEDERAL COURT

Defendants argue that plaintiffs are foreclosed from proceeding in federal court, first because they raised their constitutional challenge to defendants' regulations as a defense to the charges against them in the grievance procedure provided by union contract, and second because they claim that plaintiffs appealed to binding arbitration. The law is precisely the contrary.

This court dealt with the res judicata argument in in a single paragraph in James v. Board of Education of Central Dist. No. 1. Etc., 461 F. 2d 566, 570 (2nd Cir. 1972). In that case the state argued that a public high school teacher was barred from bringing suit in federal court to challenge his dismissal on First Amendment grounds because he had litigated his claims (including constitutional claims) before the Commissioner of Education. This court found this argument to be "totally without merit," saying:

> . . .It is. . .the law in this Circuit. . . that a Civil Rights plaintiff must exhaust state administrative remedies. Eisen v. Eastman, 421

> F. 2d 560 (2nd Cir. 1969), cert. denied, 400 U.S. 841, 91 S. Ct. 82, 27 L. Ed.2d 74 (1970). It hardly can be suggested that a Plaintiff having followed the course laid out by Eisen, was to be barred henceforth from pressing his claim to final judicial review or to be deprived of his opportunity to litigate his constitutional claims in the judicial forum of his choice. To adopt the full implication of appellees' argument would be to effect a judicial repeal of 42 U.S.C. §1983 and strike down the Supreme Court's decision in Monroe v. Pape, supra. James would be placed in the paradoxical position of being barred from the federal courts if he had not exhausted administrative remedies and barred if he had.

Similarly, plaintiffs herein have simply exhausted their administrative remedies as required by this Court's holding in Eisen v. Eastman, 421 F. 2d 560 (2nd Cir. 1969). While it is true that they were not required to argue constitutional issues before an administrator, Plano v. Baker, 504 F. 2d 595 (2nd Cir. 1974), they are clearly not barred from proceeding in federal court because they chose to defend themselves on constitutional grounds (which were the only grounds they had since they did not deny distributing leaflets) at an informal grievance proceeding.

The two cases cited by defendants (Thistlethwaite v. City of New York, 497 F. 2d 339 (2nd Cir. 1974) and Murray v. Oswald, 333 F. Supp. 490 (S.D.N.Y. 1971)) are irrelevant as they involved prior determinations by courts, not administrators.

Contrary to defendants' persistent assertion,

plaintiffs in fact did not appeal to binding arbitration.* Even if they had, however, the recent holding of the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) disposes of the argument that plaintiffs' pursuit of a contractual grievance procedure prevents them from seeking to vindicate their constitutional rights in federal court. In Alexander the Supreme Court held that plaintiff was permitted to bring a charge of racial discrimination against his employer in federal court under Title VII of the 1964 Civil Rights Act, after having brought and lost his case in arbitration under a contractual anti-discrimination clause on the same facts.

In reaching its decision, the Supreme Court stressed that the federal law and the union contract provided two entirely separate remedies, neither of which could be foreclosed by the other simply because the violation of both rights -- federal and contractual -- resulted from the same factual occurrence. The Supreme Court set forth several reasons for its decision

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* The entire history of plaintiffs alleged appeal to arbitration is contained in the letters attached to their motion for summary judgment. These letters clearly state (and Judge Motley correctly found [slip opinion p. 4]) that plaintiffs intended to proceed in federal court and simply wished to preserve their right to go to arbitration should the federal court find that arbitration was the correct forum in which to bring the case.

which are as applicable when the federal right involved is constitutional as when it is statutory. The Court said:

> . . .[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. [cite omitted] Parties usually choose an arbitrator becuase they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts. . . 39 L. Ed 2d at 163. (Emphasis added)

As in Alexander, plaintiffs herein have separate remedies; they can go the arbitration or to Federal Court, or both. The rights they seek to vindicate are separate and not necessarily compatible and pursuit of one does not foreclose the possibility of pursuing the other.

For the same reason, defendants' argument that this case must be brought under the Taylor Law before the Public Employment Relations Board (PERB) falls. It is true that this case could be brought before PERB as an unfair labor practice charge but, like arbitration, the Taylor Law provides a totally separate state law remedy which has no bearing on a federal court proceeding brought under the Consti-

tution. PERB has authority only to determine whether defendants' regulations violate the Taylor Law's prohibition of unfair labor prac[illegible]nd not whether they violate the constitution.

Plaintiffs do not dispute defendants' statement that federal policy favors arbitration of labor disputes. The issue is simply irrelevant to this case, because the legal issue involved here is one of First Amendment rights and not of labor law, although it arises in a labor context. In the words of the court in Hanover Township Federation of Teachers Local 1954 v. Hanover Community School District, 457 F.2d 456 (7th Cir. 1972), a case involving a school board's refusal to renew teaching contracts:

> A public employee is protected against discharge in retaliation against the exercise of his constitutional rights, such as his right to speak freely on issues of public importance. . .
>
> With this background, and with cases in the non-public employee category upholding free speech and related rights in connection with labor matters, the courts. . .have accepted a general proposition that public employees cannot be discharged for engaging in "union activities." Thus, if there is a discharge because of union membership, the general constitutional right of free association [cites omitted] and the free speech right [cites omitted] are correctly applied to invalidate the discharge since there is not reason to distinguish a union from any other association. 457 F.2d at 460.

See also McLaughlin v. Tilendis, 398 F. 2d 287,

289, (7th Cir. 1968).

Here, whether plaintiffs had been punished for distributing anti-war literature or union literature, the law to be applied would be the same (although the result might be different). In both cases, the issue is one of free speech and the union and job-related content of plaintiffs' actual leaflets does not turn it into one of labor relations.

POINT V.
THE DISTRICT COURT CORRECTLY GRANTED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants argue that the District Court erred in granting plaintiffs' motion for summary judgment without a hearing because material facts in the case were in dispute. While defendants did not dispute any of the facts contained in plaintiffs' statement pursuant to Rule 9(g) attached to their motion for summary judgment, plaintiffs did dispute three additional facts contained in defendants' motion. They maintained, however, and Judge Motley agreed, that these facts were not material.

The first disputed fact was whether employees are authorized to be present inside Bureau offices before and after working hours. As was discussed under point II, supra, this fact is immaterial since plaintiffs claim only that they have a right to distribute their leaflets outside of working hours at times when employees are authorized to be present in the office. Whether leafletting may be restricted during such times

presents a pure question of law.*

The second disputed factual issue was whether plaintiffs had access to their colleagues outside of the office. This fact is also immaterial because, as was discussed under Point II , supra, the presence of possible alternative sites for First Amendment activity does not justify prohibiting such activity in places where it would otherwise be premitted. The only time alternative sites need be considered is when free speech activities are shown to cause disruption on the most effective site. In that case, the degree of damage to First Amendment rights may be balanced against the degree of disruption of a legitimate state function. Where, as here, however, free speech activity in the most effective location is shown to cause no disturbance whatsoever, persons wishing to exercise their rights may not be forced to move elsewhere. Wolin v. Port of New York Authority, supra; NLRB v. Magnavox, Inc., supra; Republic

* furthermore, defendants' own testimony at the contempt hearing showed that employees in fact are authorized to be present in the office from 8:00 to 8:30 a.m. and as late as 9:00 p.m. (27). The fact that the contempt hearing followed the granting of summary judgment is irrelevant contrary to defendant's assertion. The evidence is now before this court and it would be a total waste of judicial time to order a meaningless hearing to bring out the same evidence again. Judge Motley was clearly right in her decision on this issue, but even assuming arguenda that she were in error, it is now proven that the error was harmless.

Aluminum Company v. N.L.R.B., supra, NLRB v. United Aircraft Corp., supra. Vietnam Veterans Against the War v. Morton, 506 F. 2d 53 (D.C. Cir. 1974), which involved the right of anti-war protesters to camp in a public park, is not to the contrary for the court held only that First Amendment rights are not unlimited. The District Court was therefore correct in simply considering the appropriateness of leafletting inside Bureau offices without holding a hearing on possible alternative sites for such activity.

The final issue in dispute was whether plaintiffs had appealed to binding arbitration. This, too, is immaterial as discussed under Point IV , supra, because even if they had appealed to arbitration, constitutional and contract remedies are separate and independent and the pursuit of one does not bar pursuit of the other. Alexander v. Gardner-Denver, supra. Furthermore, all evidence on this point was documentary and contained in its entirety in the record before the District Court.

POINT VI
THE DISTRICT COURT CORRECTLY FOUND DEFENDANT HOUBEN TO BE IN CONTEMPT OF COURT

There can be no doubt that the guidelines promulgated by Defendant Houben were in violation of the

District Court's order.

The facts on which the complaint rested included plaintiffs having been punished for distributing leaflets desk-to-desk without prior permission. Defendants were unable to justify their regulations prohibiting such activity and accordingly the court ordered that the punishments imposed on plaintiffs be withdrawn and that in the future they be permitted to engage in such distribution without prior permission. The guidelines promulgated subsequent to this order once again prohibited desk-to-desk distribution of literature, required prior notification of employees' intent to distribute literature,* and set up distribution procedures having the effect of preventing plaintiffs from reaching half of their colleagues.

Whether defendant Houben intended that his guidelines should have such an effect is irrelevant. The plaintiffs in a contempt proceeding are not required to allege or prove that the alleged contemnors acted

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* Although defendants claimed no intent to censor employees' literature, defendant Houben did testify that he issued the guideline because the court's order only related to job-related literature and he wished to make sure that the literature was in fact job-related, indicating the possibility of prior restraint on leaflets considered non-job-related (33).

maliciously or in bad faith. It is sufficient, to meet their burden, to allege and prove knowing non-compliance. In Re Long Island Properities, 40 F. Supp. 611, (SDNY, 1941); Telling v. Bellows-Claude Neon Co., 77 F. 2d 584, (6th Cir. 1935); see also, May Hosiery Mills v. United States District Court, 64 F. 2d 450, (9th Cir. 1933). And see, Moskovitz, "Contempt of Injunctions, Civil and Criminal," 43 Columbia L. Rev. 781 (1943), at p. 794: "In civil contempt the general rule is that the defendants need not have acted willfully, and this would seem correct, inasmuch as civil liability for damage done ought not to depend on whether or not the defendant has a 'guilty mind'."

Once knowing non-compliance has been shown, the burden shifts to the alleged contemnors to come forward with evidence showing "their inability to comply." Oriel v. Russell, 278 U.S. 358, 366 (1929). No such "inability to comply" was shown by defendants at the hearing before Judge Motley.

Defendant did, perhaps, what he believed to be proper, but that is not a defense. In Walker v. Birmingham, 388 U.S. 307 (1967), for example, the Supreme Court affirmed a contempt citation sending

Dr. Martin Luther King, Jr., and others, to jail because they ignored a court order not to demonstrate for Civil Rights. The order which Dr. King disobeyed, and the underlying ordinance which supported it, both raised substantial constitutional questions, as the Court acknowledged, but the Court, though sympathetic, thought it clear that "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom" (388 U.S. at 321).

For whatever reason, defendant Houben promulgated guidelines effectively circumventing the District Court's order and the court had no choice but to find him in contempt and to order him to change his regulations in accordance with its opinion concerning employees' First Amendment fights.

CONCLUSION

For the foregoing reasons the orders of the District Court granting plaintiffs' motion for summary sudgment and to have defendants held in contempt should be granted.

Respectfully submitted,

EVE CARY
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

Attorney for plaintiffs-appellees

Dated: February 26, 1975

AFFIDAVIT OF SERVICE
BY MAIL

State of New York)
) ss.:
County of New York)

Deborah Eisenberg being duly sworn, deposes and says that s/he is over the age of eighteen years, is not a party to this action, and resides at 230 West 16th Street NYC , that on the 26th day of Feb. , 1974/5, s/he served the annexed Brief

upon A. Seth Greenwald, Asst. Attorney General

attorney(s) for appellants , by depositing two true copies thereof enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Deborah Eisenberg
Deborah Eisenberg

Sworn to before me this
26th day of Feb ~~1974~~ 1975

Ede Cray
NOTARY PUBLIC

Notary Public, State of New York
No. 31-5638240
Qualified in New York County
Commission Expires March 30, 1976